

Neutral Citation No. - 2025:AHC:39769-DB

Court No. - 45

Case :- CRIMINAL APPEAL No. - 988 of 2019

Appellant :- Viktेशwar Alias Vishal Alias Khunti

Respondent :- State of U.P.

Counsel for Appellant :- Awadhesh Kumar Srivastava, Rabindra Bahadur Singh

Counsel for Respondent :- G.A.

WITH

Case :- CRIMINAL APPEAL No. - 193 of 2019

Appellant :- Dileep @ Ashok Sonkar And Anr.

Respondent :- State of U.P.

Counsel for Appellant :- Abhijeet Kumar Pandey, Amarnath Tiwari, Dharendra Kumar Srivastava, Manoj Kumar Tiwari, Rajneesh Kumar Srivastava, Ramendra Nath Tiwari

Counsel for Respondent :- Dewarshi Kumar Rai, G.A.

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Dr. Gautam Chowdhary, J.

1. Heard Sri Amar Nath Tiwari along with Sri Rabindra Bahadur learned counsel for the appellant in the instant as well as in connected the appeal, Sri LD.Rajbhar, learned A.G.A. for the State and perused the lower Court record.

2. The present appeal arises from the judgement and order of conviction dated 17.12.2018 passed by Sri Mohammad Gulam-ul-Madar, XII Additional District and Sessions Judge, Varanasi in Sessions Trial No. 558 of 009 (State Vs. Dileep alias Ashok Sonkar and another) and in Sessions Trial No. 368 of 2009 (State Vs. Viktेशwar alias Vishal alias alias Khuti) arising out of Case Crime No. 08 of 2009 Police Station Sarnath, District Varanasi, whereby all the accused appellants have been convicted as below:-

Sl. No.	Name of accused/appellants	Special Session Trial No.	Case Crime No.	Conviction u/s	Sentence
1.	Vikteshwar alias Vishal alias Khunti	368 of 2009	08 of 2009	302/34 IPC	Life Imprisonment along with fine of Rs. 10,000/- in default in payment of fine to undergo for additional simple imprisonment of three months.
2.	Dileep alias Ashok Sonkar	558 of 2009	08 of 2009	302/34 IPC	Life Imprisonment along with fine of Rs. 10,000/- in default in payment of fine to undergo for additional simple imprisonment of three months.
3.	Smt. Kanti Devi	558 of 2009	08 of 2009	302/34 I.P.C.	Life Imprisonment along with fine of Rs. 10,000/- in default in payment of fine to undergo for additional simple imprisonment of three months.

3. The prosecution story arose on the F.I.R. dated 08.01.2009 lodged at about 03:15 P.M. at Police Station Sarnath, District Varanasi, with respect to the occurrence described to have taken place on 08.01.2009 at about 07:00 A.M. That F.I.R. is Ex.Ka.4 at the trial. It had emerged on the strength of Written Report dated 08.01.2009

submitted by Sanjay @ Pappu (P.W.1 at the trial), written by Sri Manoj Kumar Jaiswal (not examined at the trial). That Written Report is Ex.Ka.1 at the trial.

4. According to the F.I.R. narration, the father of Sanjay @ Pappu (P.W.1) namely Mewa Lal had two wives. The first being Kanti Devi. Out of that wedlock, one son namely Dileep was born. Second wife of the deceased was Chameli to whom three children were born, namely, Sanjay alias Pappu (P.W.1) Viktешwar (one of the appellant here) and daughter Soni Sonkar (P.W.2). The F.I.R. also narrates that there existed property disputes between the deceased and his wife Kanti Devi. In that, besides Dileep (step brother of the P.W.1), Viktешwar (real brother of the P.W1), supported Smt. Kanti Devi.

5. In that background, it was narrated, on 08.01.2009 at about 07:00 A.M., when the deceased was defecating inside a constructed toilet, all the accused persons namely, Kanti Devi, Dileep and Viktешwar locked the toilet door from outside. Thereafter, the accused Viktешwar poured petrol over the deceased and set the deceased to fire with a match stick. That occurrence was witnessed by Soni Sonkar (P.W.2) and the wife of the informant namely, Sunita (not examined at the trial). Also the occurrence was witnessed by other (not named) residents of the locality.

6. Thereafter, the F.I.R. narrates that lock placed outside the door of the toilet (where the occurrence had taken place) was broken with a brick. Only then, the deceased was brought out and was admitted to hospital, where his condition was described to be serious.

7. Remarkably, no recoveries were made from the place occurrence

inasmuch as no can/container from which petrol may have been poured, or match stick or lock described to have broken open or the brick used to break that lock or sand and blanket used to douse the fire or piece of door etc. were recovered. Yet, on 08.01.2009 at about 03:40 P.M. a dying declaration of the deceased was recorded. It is Ex. Ka.-12 at the trial (not part of the paper book). We have perused the same from the original record. The dying declaration of the deceased is quoted below:-

"मेवालाल ने सतपथ बयान किया कि आज सबेरे मैं के बाहर बने पक्के पखाना में दिशा मैदान गया था। मेरी औरत चमेली एवं लड़का संजय व बलवन्त पंचकोसी सट्टी पर सब्जी बेचने गए थे। घर पर पतोहू व लड़की सोनी थी। तभी कान्ती देवी, उनका लड़का दिलीप ने मेरे लड़के विकेश्वर को मिलाकर पखाना का दरवाजा बाहर से बन्द कर दिया और नहान की दीवाल से पेट्रोल डब्बा से मेरे ऊपर फेंक दिया तथा जलती सलाई फेंककर आग लगा दी, मैं चिल्लाया तो बाहर से मेरी लड़की, पतोहू व अन्य लोगों ने दरवाजा तोड़कर मुझे निकालकर अस्पताल ले आए हैं। मुझे कान्ती देवी, उनके लड़के व विकेश्वर ने मिलकर जलाया है। मेरा कान्ती देवी, दिलीप उर्फ अशोक, लल्लन शम्भू से मुसिफ हवाली, जज खफीफा, एस.डी.एम. सदर की अदालत में मुकदमा है। इजराय न. 7/92 तथा जज खफीफा के यहां 302/93 चल रहा है। मैं कई मुकदमों में गवाहनी हूँ। बयान सुनकर तस्दीक किया"

8. The deceased survived for a day. He died on 10.01.2009 at the hospital.

9. 'Panchayatnama' was drawn on 10.01.2009. That 'Panchayanama' is Ex.Ka.2 at the trial. Also, autopsy report was prepared by Dr. Vivek Awasthi (P.W.3 at the trial). That report is Ex.Ka.3 at the trial. Thereafter, on completion of the investigation, a charge sheet was submitted by the Investigating Officer on 05.03.2009 and 31.05.2009. Upon the trial being committed to the Court of Sessions, the following charges were framed:-

1. यह कि आप अभियुक्तगण और सह अभियुक्त विट्टेश्वर उर्फ

विशाल उर्फ खूँटी के साथ ने मृतक मेवालाल का सदोष मानववध कारित करने के लिए सहमत हुए और उक्त सहमति के अनुसरण में सह अभियुक्त विट्टेश्वर उर्फ विशाल उर्फ खूँटी ने दिनांक 08.01.2009 को अपने पिता मेवालाल के ऊपर पेट्रोल डालकर आग लगा दिया जब व लैटिरन गए थे और लैटिरन में बाहर से ताला जड़ दिया, जिसके कारण जलने से आयी प्राणघातक चोटों के कारण मेवालाल की चिकित्सा के दौरान दिनांक 10.01.2009 को 06.00 बजे प्रातः मृत्यु हो गयी। इस प्रकार आप अभियुक्तगण ने उक्त मेवालाल के आपराधिक मानव-वध कारित करने का षडयंत्र कारित किया, जिसके अनुसरण में सह अभियुक्त ने मेवालाल को ऐसी शारीरिक क्षति साशय कारित किया जिससे मृत्यु होना सम्भाव्य है और उक्त शारीरिक क्षति के कारण मेवालाल की मृत्यु हो गयी। इस प्रकार आपने धारा 304 सपठित धारा 120 बी को अपराध कारित किया जो इस न्यायालय के प्रस्ताव में है।

अथवा (वैकल्पिक आरोप)

आप अभियुक्तगण ने सह अभियुक्त विट्टेश्वर उर्फ विशाल उर्फ खूँटी के साथ सहयुक्त होकर उपरोक्त मेवालाल की हत्या कर आपराधिक षडयंत्र कारित किया, जिसके अनुसरण में दिनांक 08.01.2009 को प्रातः 08.00 बजे उक्त विट्टेश्वर उर्फ विशाल उर्फ खूँटी ने अपने पिता मेवालाल के ऊपर लैटिरन में हत्या के आशय से पेट्रोल डालकर आग लगा दिया और लैटिरन के बाहर से ताला जड़ दिया। इस घटना में आयी प्राणघातक चोटों से मेवालाल की चिकित्सा के दौरान दिनांक 10.02.2009 को 06.10 बजे प्रातः मृत्यु हो गयी। इस प्रकार आप अभियुक्त ने सह अभियुक्त विट्टेश्वर के साथ मेवालाल की हत्या का षडयंत्र कारित किया जिसके अनुसरण में उक्त विट्टेश्वर उर्फ विशाल उर्फ खूँटी द्वारा उक्त मेवालाल की हत्या कारित की गयी और आपका उक्त कार्य धारा 302/120 बी भा.द.सं. के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

10. At the trial, besides the above documentary evidence, prosecution led oral evidence of Sanjay @ Pappu, the first informant (P.W.1). He had not seen the occurrence. He reported to the police as allegedly informed to him by his sister Soni Sonker (P.W.2) as also by his father. During his cross examination, he admitted that the appellant Kanti was present at the time of occurrence and that she accompanied the said witness to the hospital at Kabir Chowk, where the deceased was admitted.

11. Soni Sonker (P.W.2 at the trial) daughter of the deceased, is also not an eye-witness of the occurrence of petrol being poured on the

deceased by the appellants or of the deceased being lit up by the appellant. She only claimed that she heard shouts/cries of her father. She responded to the same and found that the door of the toilet was locked from outside. She also described that the lock was broken with a brick and thereafter the deceased was brought out and the fire was doused with sand and blanket. As noted, no recovery of sand, brick, blanket earth/floor, earth etc. was made from the place of occurrence. She also described that her sister-in-law namely, Sunita was present. However, it is true that Sunita was never examined at the trial.

12. As to the manner in which the occurrence was caused, P.W.2 claimed that she was told by her father i.e. the deceased told her that the occurrence had been caused by the appellant.

13. Thereafter, Dr. Vivek Awasthi (P.W.-3) was examined. He proved the autopsy report. In that he proved that dermo edima infected injury was suffered and noted all over the body of the deceased, including his right shoulder, face, abdomen and both legs, his internal organ lungs were also found infected. The cause of death was proven as septicemia shock.

14. Thereafter, Constable Saiyyad Sartaz (P.W.-4) was examined, who proved the chick FIR and other documents. Inspector Dharendra Pratap Singh (P.W.-5), who conducted the investigation was examined next. He proved that the named accused persons along with appellant Kanti Devi were arrested on 09.01.2009. He also proved the other arrests made, including that the '*Panchayatnama*' was prepared on 10.01.2009 and other facts pertaining to the investigation, that occurred thereafter.

15. Remarkably, he did not prove any investigation of substance conducted either as to visit to the place of occurrence or to the recoveries made therefrom. On the contrary, he proved that he prepared the site plan on 12.01.2009 i.e. about four days after the occurrence. It is equally true that even after the arrest of the appellant, no recovery was made as may be attributed to the disclosure made by the appellants.

16. Thereafter, Puneet Shukla, the then Additional City Magistrate-II, in whose presence the alleged dying declaration was recorded, was examined as P.W.-6. In that he proved the fact that the doctor had certified the deposing state of the deceased at the time of his statement being recorded and that he had recorded the dying declaration. While describing that statement, the said witness did state that the deceased had in his dying declaration stated that the appellant Dileep @ Ashok Sonkar had called ('*bulakar*'), the appellant Viktेशwar Alias Vishal Alias Khunti and locked the toilet door from outside. However, the original dying declaration does not contain any such disclosure. It clearly states that the accused persons had committed the occurrence together ('*milkar*').

17. During his cross-examination, he admitted that he never asked the deceased as to who poured the petrol over the deceased and whether he had seen that person. Similarly, he admitted that he never asked the deceased whether he had seen who lit up the fire and if he had seen that person.

18. Upon the prosecution evidence being closed, the statement of appellants were recorded under Section 313 Cr.P.C. They denied any involvement in the occurrence. They suggested that they had been

falsely implicated without any rhyme and reason. The appellant Dileep suggested that he was not even present at the place of occurrence, having gone to visit his maternal grand parent. Similar statements were made by the other appellants as well.

19. Thereafter, by way of defence evidence, Bache Lal was examined as D.W.-1 and Babu Lal Sonkar was examined as D.W.-2. Bache Lal stated that Kanti Devi was present at her residence even after the occurrence and that she accompanied the deceased to the hospital as his wife. He also stated that the appellant Dileep @ Ashok Sonkar was not present in the place and time of occurrence. Bachche Lal (D.W.-1) is the maternal grand father of the appellant Dileep @ Ashok Sonkar. He also stated that Dileep was present at his house, on the date and time of the occurrence.

20. In such circumstances, learned court below has found the appellants guilty and awarded life sentence, accordingly.

21. Submission of learned counsel for the appellants is, there is no credible evidence to hold the appellants guilty of such occurrence. The prosecution story is wholly incredulous and unbelievable. Though the case of direct evidence was setup, other than the dying declaration, no eye witness account of the actual occurrence exists. P.W.-1 was clearly not present near the place of occurrence, he having left for his work early in the morning at about 5.30 a.m.- one and half hour before the occurrence took place. P.W.-2 narrated only that much as may have been told to her.

22. Insofar as the dying declaration is concerned, it has been submitted, undeniably the deceased was defecating inside a toilet, that

was first locked from outside. In such circumstance, by way of a wholly natural occurrence, the deceased would have been defecating inside the toilet, with the door closed/shut from inside. At that point, he described that the appellants locked him from outside and the appellant Dileep @ Ashok Sonkar poured petrol over him from over the wall of the bathroom area. Therefore, he too had not seen the actual occurrence. In fact the manner in which he described the occurrence in the dying declaration, the deceased could never have seen the occurrence. Yet, no effort was made by the prosecution to establish through any material or evidentiary corroboration that there was any possibility of his witnessing such an occurrence. In fact the deceased could not have seen the same. No corroboration exists by way of any material recovered from the place of occurrence. Thus, it is the consistent prosecution story that the lock placed on the door of that toilet from outside, was broken with a brick and that the deceased was pulled out from the toilet and the fire doused with sand and blanket. No recovery was made either of the brick or broken lock or sand or blanket or piece of door or clothes or of the can that was described to have been thrown aside by the appellant Dileep @ Ashok Sonkar after causing the occurrence or of any piece of the toilet floor or of earth.

23. Coming to the dying declaration, it has been submitted, though it may not be disputed that the dying declaration was recorded, it is not the law that the dying declaration is the gospel truth. He has relied upon a judgment of the Supreme Court passed in **P. Mani Vs. State of Tamil Nadu, (2006) 3 SCC 161**.

24. Then, it has been submitted, undeniably the appellant Kanti Devi had not fled from the place of occurrence, her presence has been established by Sanjay @ Pappu (P.W.-1), himself. Therefore, the

adverse circumstance relied by the learned court below, is not real. As to the presence of Dileep @ Ashok Sonkar, heavy reliance has been placed upon the evidence and he was not present at place and time of occurrence, rather, he was present at the residence of his matrimonial grand father. As to the appellant Viktेशwar alias Vishal alias Khunti reference has been made to the fact that there were pre-existing disputes between Sanjay @ Pappu (P.W.-1), both real brothers. In that, the occurrence was caused wholly otherwise. The present appellants were falsely implicated. Only to settle the property disputes between the parties- as conviction of the present appellants would ensure that they do not inherit the estate of the deceased, false accusation has been made. Here, it has been emphasised that Chameli is the second wife of the deceased. The deceased being Hindu, the rights of the informant side including those of Chameli stood on a much lesser footing. So long as Kanti Devi and Dileep @ Ashok Sonkar are alive and so long as they did not incur disability in law to inherit to the estate of the deceased, the said Chameli and her children would stand to loose.

25. On the other hand learned A.G.A. has opposed the appeals and placed heavy reliance upon the dying declaration. He submits that there is nothing to doubt that such a declaration was recorded, promptly. The doctor certified the deposing state of the deceased and the Additional City Magistrate-II, who recorded the statement, duly proved that fact, at the trial. Minor inconsistency/departure made by the said witness, namely, Puneet Shukla (P.W.-6) that the appellants had been 'called', would not dilute the dying declaration which is complete in all respects. He also relied on the statement of the Soni Sonkar (P.W.-2) who described the occurrence as it unfolded. Therein, she proved that a lock was placed by the appellants from outside (on the toilet door),

where the deceased was assaulted and that was broken open using a brick and only thereafter, the deceased was brought out and the fire doused. No doubt arose in an elaborate cross-examination, as to that occurrence.

26. He has also relied on the motive of pre-existing property disputes, wherein the appellants stood to lose their exclusive share in the property of the deceased. It has been asserted, they had every motive to commit the crime.

27. Having heard learned counsel for the parties and having perused the record, in the first place, there is no reason to doubt that the occurrence took place at around 7.00 a.m. at the dwelling house of the deceased wherein he suffered extensive burn injuries caused upon fire being lit on him after pouring an inflammable material on him. In that it has to be noted that the deceased was a male adult, about 52 years of age.

28. According to the prosecution story, it is also not in doubt that the prosecution has brought a case of direct evidence. Yet other than the dying declaration, there is no account of the actual occurrence. P.W.-1, on his own admission, was not present at the common dwelling house of the parties, he having left for his vegetable shop, much before the occurrence. He further claimed that he arrived at the place of occurrence after he heard of the same at about 8.00 a.m. upon information given to him by his sister, namely, Soni Sonkar (P.W.-2). Thus, he never saw the occurrence.

29. Insofar as Soni Sonkar (P.W.-2) is concerned, she has also not seen the occurrence. She only described that she was on the terrace of

the her house when she heard cries for help, of her father. On hearing such cries, she ran to help him. She found that the door of the toilet, in which her father had been assaulted, was locked from outside. She claimed that she broke open the door with a brick, whereafter he was brought out and the fire doused with sand and blanket. Thus, she had also not seen the person, who may have caused the occurrence. That is her categorical stand.

30. Other than that Sarita [wife of the first informant-Sanjay @ Pappu (P.W.-1)], who is also described to have been present at the place of occurrence, was never examined. Remarkably, though the prosecution witness stated that their neighbours or other people had gathered at the place and time of occurrence, none was named and none was examined at the trial.

31. What then remains is the dying declaration. We have considered the contents of the dying declaration. In that the situation/circumstance in which the deceased was at the time of occurrence, has to be noticed first. It is the consistent case of the prosecution and there is absolutely no other version that the occurrence took place in the morning hours, on 08.01.2009 when the deceased had gone to defecate, inside a constructed toilet that had a door. The prosecution has not described that the said toilet/door had any window or aperture from which the deceased could have observed who was outside that toilet or that he had seen any person from inside the toilet. Normally, the door would have been kept closed from inside or at least kept shut, if not locked or bolted from inside. That is a natural/normal conduct of any human being, arising from concerns of privacy. The prosecution did not prove otherwise.

32. No disclosure, whatsoever, was made, either by any prosecution witness or in the dying declaration that the deceased had heard any word spoken by any of the appellants or seen any person at the time and place of occurrence being caused as may have allowed him to identify the assailants. Thus, the entire dying declaration has been recorded on an assumption that the deceased knew what was happening outside the bathroom in which he was defecating, naturally with the toilet door closed or shut from inside, for reason of normal privacy that human beings naturally/normally claim while defecating, especially so when any adult human being uses a constructed toilet facility, for such purpose as against defecation, in open.

33. In that aspect, the dying declaration makes a statement by way of a first person account as if the declarant had seen what was happening from behind a closed door, without a word being spoken. That is wholly improbable, not generally, but specifically in the facts as proven by the prosecution. Having placed the deceased inside a (closed) toilet, the burden was on the prosecution to explain how the deceased could have made such statement when he was locked up from inside with no window and/or aperture and when he did not claim that he saw any person carry a can filled with petrol and when he did not hear any spoken word, that could indicate to him that such person was intending to cause such an occurrence.

34. The dying declaration is further doubtful insofar as it narrates that the appellant Dileep @ Ashok Sonkar poured petrol over the deceased from above the partition wall between the (unoccupied) bathroom area and the toilet (where the deceased was defecating). In such situation as may have existed, without any other fact being proven, it is not possible to presume or assume that the partition wall

would have been below the eye line of the deceased as may have allowed the deceased a clear view, across such wall. If the wall was so low, he would have found no difficulty in escaping from the toilet either, by jumping over such a low wall and escaping through the bathroom.

35. In **Khushal Rao Vs. State of Bombay, 1957 SCC Online SC 20**, the Supreme Court considered the evidentiary value of a dying declaration. It also considered the test to be applied by Courts while reading a dying declaration, to convict the accused. In that the Supreme Court noted its approval to a Full Bench decision of the Madras High Court in **Re Guruswami Tevar & Ors., 1939 SCC Online Mad 411**. Thereafter, it observed as below :

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at

the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

36. Then, in **K. Ramachandra Reddy & Anr. Vs. The Public Prosecutor, (1976) 3 SCC 618**, the Supreme Court made the following pertinent observation as to the reliability of a dying declaration - where the declarant may not have had "*clear opportunity to observe and identify his assailants*" and/or if the Court is not satisfied that the declarant "*was making the statement without influence or rancour*" :

"While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration."

37. Next, in **Laxman Vs. State of Maharashtra, (2002) 6 SCC 710**, the Supreme Court has also observed as below :

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a

product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant."

38. Thereafter, in **P. Mani (supra)**, the Supreme Court observed as below :

"14. Indisputably conviction can be recorded on the basis of the dying declaration alone but therefor the same must be wholly reliable. In a case where suspicion can be raised as regards the correctness of the dying declaration, the court before convicting an accused on the basis thereof would look for some corroborative evidence. Suspicion, it is trite, is no substitute for proof. If evidence brought on record suggests that such dying declaration does not reveal the entire truth, it may be considered only as a piece of evidence in which event conviction may not be rested only on the basis thereof. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them. In this case the circumstances which have been brought on record clearly point out that what might have been stated in the dying declaration may not be correct. If the deceased had been nurturing a grudge against her husband for a long time, she while committing suicide herself may try to implicate him so as to make his life miserable. In the present case where the appellant has been charged under Section 302 of the Penal Code, the presumption in terms of Section 113-A of the Evidence Act is not available. In the absence of such a presumption, the conviction and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused."

39. In **J. Ramulu Vs. State of Andhra Pradesh, (2009) 16 SCC 432**, the principle laid down by the Supreme Court in **P. Mani (supra)** was reiterated. Thereafter, in **Puran Chand Vs. State of Haryana, (2010) 6 SCC 566**, that Court has observed as below :

"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

18. The law is now well settled that a dying declaration which has

been found to be voluntary and truthful and which is free from any doubts can be the sole basis for convicting the accused."

40. Though the law is that a dying declaration duly proven is admissible evidence and neither by rule of law nor by rule of prudence it requires corroboration before it may be acted upon by courts, at the same time, we may remain careful while seeking to convict the accused persons solely on the strength of such a dying declaration. If the dying declaration is shrouded with suspicion or if the declarant could not have observed the facts disclosed by him or if doubt exists on proven facts that such declaration may be prejudiced by previous disputes between the parties or such like grounds, we may remain careful that the statement made by the deceased as is recorded in the dying declaration is an ex-parte statement. Leave alone lack of cross-examination, the accused had no opportunity to question the maker of the statement on any aspect. Therefore, upon it being proved, the dying declaration must be such as may inspire confidence with the Court, not only to reach a conclusion that the deceased had spoken the truth but that it narrates facts as could have been known to the deceased, by way of his personal knowledge, at the relevant time.

41. Examined on that touchstone, in view of our observations made above, it is totally doubted if the deceased could have seen the appellants. It is wholly doubtful that while squatting or sitting inside a constructed toilet of which the door would have been shut (as the deceased was defecating at that time), he had any opportunity to see either that the appellants locked him inside that toilet, from the outside or that the appellant Viktेशwar poured petrol over the deceased, from above the partition wall separating that toilet from the bathroom or that any of the appellants lit up a match stick and threw such lighted match sticks inside that toilet, from above that partition wall. Here, we note

that the dying declaration does not indicate either that the door of the toilet was not shut from inside or that there was an aperture in that door or toilet that allowed the deceased any view of the assailants or that the deceased had seen the assailants while petrol was being poured over him or matchsticks were lit and thrown on him. The dying declaration also does not contain any description that the deceased heard any word spoken by any of the assailants, as may have allowed him to identify the appellants or anyone of them as the assailant. The prosecution led no evidence to the above effect.

42. Thus, neither P.W.-1 nor P.W.-2 nor any other witness was examined by the prosecution to establish that the appellants or the assailants were seen causing the occurrence as narrated in the dying declaration. That corroboration is admittedly lacking. On the contrary, P.W.-1 contradicted P.W.-2 in material part. He proved that the appellant Kanti Devi remained present at the dwelling house of the deceased after the occurrence and she accompanied the said injured/deceased to the hospital in her capacity as the wife of the deceased.

43. It also cannot be lost sight of that the appellant Smt. Kanti Devi is the first wife of the deceased whereas the appellant Dileep is the son born to her. It is also admitted to the prosecution that the deceased married Chameli, by way of his second marriage during the subsistence of his marriage to Smt. Kanti Devi. Sanjay @ Pappu (P.W.-1), Soni Sonkar (P.W.-2) and Viktेशwar (one of the appellants here) were born to that marriage. It is also admitted to the prosecution that the parties were in dispute from before. Primarily, those disputes being property disputes arising within the family in the two sub-branches - one of the appellant Kanti Devi (first wife) and her son Dileep, and another of

Chameli and her three children namely, P.W.-1, P.W.-2 and Viktेशwar.

44. In such circumstances, doubt exists as to what may have been in the mind of the deceased at the time of such a dying declaration being recorded. That doubt was not explained at the trial. In such circumstances, it cannot be ruled out that in face of the other circumstances and reasonable doubts noted above, the dying declaration may have been motivated by displeasure or rancour of the deceased towards his first wife Kanti Devi and the other appellants. Here, we reiterate, that the dying declaration is paraphrased and very descriptive as if the deceased had seen the entire occurrence whereas it is proven on record that the deceased may not have been in a position to witness the occurrence, as narrated. In such facts, in the absence of any question put to the deceased by the person before whom such statement was being made, introduces further doubts as to the credibility of such a dying declaration.

45. Then further doubt arise in view of the complete absence of any recovery of either the empty can of petrol described to have been thrown by the appellant Dillep (as described by P.W.-2 Soni Sonkar), or the match box used to light up the deceased or the blanket or the burnt clothes or sand as were described by P.W.-2-to have been used to douse the fire suffered by the deceased. Though ocular description exists of the lock being broken open by the brick, no recovery of broken lock and no recovery of brick has been made. Again, according to the prosecution story, the occurrence took place inside a closed toilet room. The door of the toilet had been locked from outside. The extent of burn injuries suffered by the deceased clearly indicate that in face of evidence of such occurrence caused by inflammable material/ petrol used, smoke and collateral damage caused to the floor or walls or

ceiling or the door would have existed. Yet, no recovery whatsoever was made of any of those items. That material corroboration as would fix the place of occurrence, is completely lacking.

46. It in this context, we have noted the statement of the Investigating Officer that clearly establishes that such investigation was never conducted and such evidence was never gathered as may have corroborated the prosecution story that the occurrence took place inside the toilet used by the deceased at the time of the occurrence or that its door had been locked from the outside. That deficiency or lack of investigation blows a gaping hole in the entire prosecution story.

47. Reading the dying declaration, it appears perfectly paraphrased, as if it were statement recorded under Section 164 Cr.P.C. or recorded during an examination-in-chief. While, it cannot be ruled out by way of law that such occurrence may arise, at the same time the doubts expressed by the defence during the cross-examination of Puneet Shukla (P.W.-6) that no question was asked to the deceased as to who poured petrol over him and who lit the fire and whether the deceased had seen that person, does appeal to us to indicate that the dying declaration though recorded, may not be true.

48. As to how the occurrence may have been caused is not for the Court to speculate or to investigate. Suffice to note, the burden to establish that the occurrence was caused by the appellants in the manner disclosed, rested on the prosecution. It was the further burden of the prosecution to establish that occurrence beyond reasonable doubt. That was not done.

49. For the reasons noted above, we are of the clear opinion that the

prosecution failed to establish that the occurrence was caused by the appellants. Less so such occurrence was established beyond reasonable doubt.

50. Consequently, this appeal succeeds and is allowed. The judgment and order of conviction dated 17.12.2018 passed by Sri Mohammad Gulam-ul-Madar, XII Additional District and Sessions Judge, Varanasi in Sessions Trial No. 558 of 009 (State Vs. Dileep alias Ashok Sonkar and another) and in Sessions Trial No. 368 of 2009 (State Vs. Viktेशwar alias Vishal alias Khuti) arising out of Case Crime No. 08 of 2009, Police Station Sarnath, District Varanasi, is set aside. The appellants are acquitted of the charges of offence framed against them. The accused-appellants are in jail. Let them be released, forthwith, unless they are wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

51. The trial Court record along with the copy of this judgment and order be transmitted to the court concerned, forthwith.

52. Let a copy of this judgment be sent to the Jail Authorities concerned and the court concerned for compliance.

53. In view of the aforesaid, the pending application(s), if any, of these appeals also stands disposed of.

Order Date :- 19.03.2025
S.Ali/ Anurag

(Dr. Gautam Chowdhary, J.) (S.D.Singh, J.)